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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1234

H. L. RICHARDSON, et al.,
Petitioners,

vs.

BOB LOKEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court

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No.

H. L. RICHARDSON, et al.,
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VS.

BOB LOKEY,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioners, H. L. Richardson, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 11, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 600 F.2d 1265 and is attached to this petition as Appendix A. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* is unreported and is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 11, 1979. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on December 7, 1979. This petition is timely filed within 90 days of the latter date. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTION PRESENTED

When no interest in liberty based upon state law is alleged or implicated, does the inmate of a state prison have a right under Title 42, United States Code section 1983 to maintain a claim for damages for mental and emotional distress when state prison officials, without affording the inmate an opportunity to be heard, determine for security reasons that the inmate may no longer be permitted outside the walls of his prison?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Title 42, United States Code section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case was here before as *Richardson v. Lokey*, 427 U.S. 902 (1976), wherein this Court vacated an earlier decision of the Court of Appeals for the Ninth Circuit. This petition seeks review of a subsequent decision of the same Court of Appeals following remand.

The underlying facts are unchanged. On November 2, 1972, the Chief Deputy Director of the California Department of Corrections advised all penal institutions within the state that "[e]ffective this date . . . , no inmate serving life without possibility of parole is to be classified minimum custody without prior review and concurrence by the Departmental Review Board" (R 93).[1] This change in policy was prompted by the convergence of two occurrences. First, following the invalidation of the death penalty as it then operated in the state, a number of inmates serving prison terms for the commission of serious offenses had to be reclassified. Second, during the reclassification period, an inmate serving a life sentence without possibility of parole escaped from his prison (R 110).

At the time of the announced change in policy, Bob Lokey was confined at the California State Prison at San Quentin. He was serving a life sentence without possibility of parole for his commission of first-degree murder in violation of California Penal Code section 187 and kid-

[1] "R" references are to the Record filed in the United States Court of Appeals for the Ninth Circuit.

napping for the purpose of robbery with bodily harm in violation of California Penal Code section 209. *See In re Lokey,* 64 Cal.2d 626, 51 Cal.Rptr. 266 (1966). Lokey's security status at this time was minimum custody. He had been so classified for a period of two and one-half years. Based on this classification, he was permitted to travel outside the prison accompanied only by an unarmed security guard, was second in command of the San Quentin firehouse located outside the prison, and was permitted outside the prison to take part in an overnight family visitation program (R 12).

Upon receiving notification of the policy change, the staff at San Quentin referred Lokey's case to the Departmental Review Board as required. On December 15, 1972, the Board reviewed Lokey's case in detail. Based on that review, the Board ruled that Lokey was not approved for assignment outside the security fence area (R 94). Lokey thereafter had to remain in areas within the security fence (R 12, 110).[2]

On April 11, 1973, Lokey, acting on behalf of himself and three family members, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California. In that complaint, Lokey alleged violations of his civil rights under Title 42, United States Code section 1983 arising from the rescission of his minimum custody classification (R 1). Defendants in the action (hereinafter petitioners) moved in

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[2]Based upon changes in California's sentencing laws, the California Community Release Board on December 16, 1977, modified Lokey's sentence to provide for the possibility of parole. Then on January 17, 1978, effective March 18, 1978, the Community Release Board granted Lokey parole.

response for dismissal of the complaint or in the alternative for summary judgment (R 43). On December 4, 1973, the district court granted petitioners' motion for summary judgment (R 126, 127).

Lokey appealed to the United States Court of Appeals for the Ninth Circuit (R 128). On April 16, 1975, the Court of Appeals reversed the judgment of the district court and remanded the case for further proceedings. (This opinion is unreported and is attached as Appendix C.) Petitioners applied for rehearing and suggested that a rehearing *en banc* be granted. On December 9, 1975, the Court of Appeals ordered its earlier opinion withdrawn. (This order is unreported and is attached as Appendix D.) Then in a new opinion, the Court of Appeals again reversed the judgment of the district court and remanded the case for further proceedings. (This opinion is reported at 527 F.2d 949 and is attached as Appendix E.)

Petitioners applied to this Court for a writ of certiorari. On June 29, 1976, this Court vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of *Meachum v. Fano,* 427 U.S. 215 (1976), and *Montanye v. Haymes,* 427 U.S. 236 (1976). (This order is reported at 427 U.S. 902 and is attached as Appendix F.) On September 9, 1976, the Court of Appeals, in turn, vacated the summary judgment and remanded the case for further proceedings consistent with *Meachum* and *Montanye* (R 139, 142, 143). (This order is reported at 540 F.2d 1022 and is attached as Appendix G.) On October 8, 1976, the district court ordered the complaint dismissed in view of *Meachum* and *Montanye* and also in

view of a change in Lokey's confinement to minimum security which rendered the issues raised in his complaint moot (R 144).

Lokey once more appealed to the Court of Appeals (R 151).[3] On July 11, 1979, the Court of Appeals reversed the judgment of the district court and, although Lokey had twice previously failed to plead his case sufficiently, remanded the case for further proceedings. In so doing, the court extended to Lokey an opportunity to proceed to trial on an issue of damages for alleged violations of procedural rights. The court made no determination of what, if any, procedural rights were involved in Lokey's transfer. (This opinion is reported at 600 F.2d 1265 and is attached as Appendix A.)

REASONS FOR GRANTING THE WRIT

In *Meachum v. Fano,* 427 U.S. 215, 229 (1976), this Court advised that "[t]he federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." In its opinion below, the Court of Appeals ignored this admonition. Moreover, the Court of Appeals in the process created a conflict with decisional authority from another circuit.

The import of the opinion below is that any inmate of a state prison, simply by claiming damages, may maintain

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[3]Shortly after filing this appeal, Lokey also filed a "motion to sever parties" in which he asked that his three family members be removed as plaintiffs and that the "Adult Authority and Adult Authority members" be removed as defendants (R 160-161).

At this time, the Adult Authority was the state's parole board. In 1977, the Adult Authority was replaced by the Community Release Board.

an action in federal court to contest any decision state prison officials make in which, without affording him an opportunity to be heard, they change his custodial status, however inconsequentially. This opinion contravenes principles settled in *Meachum v. Fano, supra,* 427 U.S. at 215, and *Montanye v. Haymes,* 427 U.S. 236 (1976). The opinion in addition portends inevitable litigative testing of, and judicial intervention in, the administration of our state penal institutions.

The substance of the opinion below furthermore conflicts with the opinion of the Court of Appeals for the Fifth Circuit in *Franklin v. Fortner,* 541 F.2d 494 (5th Cir. 1976). In *Franklin,* the inmate of a state prison filed an action in federal court for damages after state prison officials reclassified his custodial status without granting him a hearing. The Court of Appeals ruled that the district court properly dismissed the action under the authority of *Meachum* and *Montanye.* The Court of Appeals thereby reached a diametrically different conclusion from that reached here even though the facts in the two cases were similar.

A. THE OPINION BELOW CONTRAVENES CONTROLLING DECISIONAL AUTHORITY OF THIS COURT

In *Montanye v. Haymes, supra,* 427 U.S. at 242, this Court reiterated:

> "[N]o Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right

> or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events."

See Meachum v. Fano, supra, 427 U.S. at 223-227.

Consequently, an inmate may not use a federal forum to litigate a decision transferring him within the prison system based on the presumption that state law rights are implicated. Rather, the inmate must first establish that state law has given him a vested interest in remaining in the same location. The Court of Appeals, however, circumvented this principle. The court acknowledged that Lokey had not previously demonstrated that any compensable procedural rights were violated by the manner of his reassignment from a position outside prison walls to another within. Nevertheless, without a specification of the due process issues to be litigated, the court authorized Lokey to proceed to trial.

Three matters are particularly objectionable in this result. First, in reaching this decision, the Court of Appeals followed a self-contradictory line of reasoning. The court stated that the "allegations and the record thus far assert a claim for damages for mental and emotional distress arising from the failure to observe [Lokey's] procedural rights that could be compensable." 600 F.2d at 1266 (App. A, Slip Op. A-2). But, the court then conceded that Lokey had not shown what state law or practice generated the alleged procedural rights. Despite this, the court directed that Lokey be provided with the opportunity "to explore and present his case with respect to state-created expectations . . ." 600 F.2d at 1267 (App. A, Slip

Op. A-3). The court thus placed the cart before the horse because no federal claim is stated in the absence of a "right or justifiable expectation rooted in state law" giving rise to procedural safeguards. *Montanye v. Haymes, supra,* 427 U.S. at 242.

Second, as support for its decision, the Court of Appeals incorrectly relied on *Carey v. Piphus,* 435 U.S. 247, (1978). In that case, public school students brought suit under Title 42, United States Code section 1983 against certain school officials who suspended them without affording them hearings. This Court held that, although mental and emotional distress caused by the denial of procedural due process is compensable, proof must be offered that harm actually occurred before compensatory damages may be recovered. 435 U.S. at 259-264. The Court also held that, because of the importance of the issues involved, the denial of procedural due process is actionable for nominal damages without proof of actual injury. 435 U.S. at 266-267. Implicit in these holdings is the view that the students were in fact entitled to procedural due process before being suspended. *See Goss v. Lopez,* 419 U.S. 565 (1975). But, such an assumption is not operative in this case because Lokey, as confirmed by *Meachum* and *Montanye,* had no right to a hearing before being reassigned. *Carey* thus is inapposite.

Third, in arriving at its decision, the Court of Appeals ignored pertinent state law establishing that the custodial classification of an inmate is a matter largely within the discretion of the California Department of Corrections. *See* Calif. Pen. Code §§ 5068 and 5080. (These statutes

are attached as Appendix H.) *See also In re Henderson*, 25 Cal.App.3d 68, 74-77, 101 Cal.Rptr. 479, 483-485 (1972).

The Court of Appeals also disregarded several other matters. First, Lokey in his original complaint did not make any allegation regarding expectations rooted in state law (R 1). Secondly, Lokey in his supplemental brief to the Court of Appeals admitted that provisions in the California Department of Corrections Classification Manual, pertinent to the issue of inmate classifications, were not in effect when his custodial status was changed (Suppl. Brief, pp. 9-10). Thirdly, Lokey in his supplemental reply brief to the Court of Appeals "concede[d] that no state law was in existence at the time of the rescission of his minimum custody classification which guaranteed him that classification absent proof of specific acts of misconduct" (Suppl. Reply Brief, pp. 1-2). Accordingly, Lokey as a matter of law as well as of fact had no state-based expectations that his custodial status would not be changed without affording him an opportunity to be heard.

In view of these considerations, the Court of Appeals rendered an analytically unsound opinion. Based on that opinion, any inmate of a state prison, merely by claiming damages in an action brought in federal court, may now challenge virtually any determination state prison officials make in which they change his custodial status without giving him an opportunity to be heard. The opinion thus will cause the federal judiciary to become involved in "the day-to-day functioning of state prisons" and will "involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum v.*

Fano, supra, 427 U.S. at 228-229. Given the magnitude of the consequences, the grant of a writ of certiorari, therefore, is essential.

B. THE OPINION BELOW CONFLICTS WITH DECISIONAL AUTHORITY FROM ANOTHER CIRCUIT

In *Franklin v. Fortner, supra,* 541 F.2d at 494, the inmate of a state prison in Florida filed suit under Title 42, United States Code section 1983 alleging violations of his rights under the Fourteenth and Eighth Amendments. The inmate sought declaratory, injunctive and monetary relief against prison officials for his transfer from minimum-medium security to maximum security without notice and hearing. The inmate also declared that the maximum security confinement was served under inhumane conditions.

The district court granted summary judgment in favor of the prison officials and held that the original transfer was the result of a permissible classification change. On appeal, the inmate argued that he should be allowed to maintain his claim for compensatory damages. The Court of Appeals for the Fifth Circuit, relying on *Meachum* and *Montanye,* rejected the inmate's position and ruled that the district court correctly dismissed the damage aspect of the suit.

The opinion in *Franklin* conflicts directly with the opinion below in terms of the approaches utilized and the results reached. These differences between the Fifth and Ninth Circuits thus warrant resolution by the only Court that is empowered to give a uniformly applicable and authoritative answer. In light of the significance of the

interests involved, the grant of a writ of certiorari, therefore, is necessary.[4]

CONCLUSION

The opinion below, on an issue of profound importance to the states for the administration of their penal institutions, represents an unwarranted departure from controlling decisional authority of this Court. Furthermore, the opinion conflicts directly with the opinion of another Court of Appeals. For these reasons, the petition for a writ of certiorari should be granted.

Dated: February 8, 1980

Respectfully submitted,

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(Appendices Follow)

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[4]The approach followed in *Franklin* is similar to that used in a number of other cases. *See Cooper v. Riddle*, 540 F.2d 731 (4th Cir. 1976); *Russell v. Oliver*, 552 F.2d 115 (4th Cir. 1977); *Daigle v. Hall*, 564 F.2d 884 (1st Cir. 1977); *Altizer v. Paderick*, 569 F.2d 812 (4th Cir.), *cert. denied*, 435 U.S. 1009 (1978).

Appendices

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

No. 77-1689

Bob Lokey, et al.,
Plaintiffs-Appellants,

vs.

H. L. Richardson, et al.,
Defendants-Appellees.

[Filed July 11, 1979]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, ELY, and ANDERSON, Circuit Judges

PER CURIAM:

Appellant Lokey's section 1983 action challenging termination of his minimum custody status by California prison officials is before us for the third time. The events upon which the action is based are stated in *Lokey v. Richardson,* 527 F.2d 949 (9th Cir. 1975). That judgment was vacated by the Supreme Court for reconsideration in light of *Meachum v. Fano,* 427 U.S. 215 (1976), and *Montanye v. Haymes,* 427 U.S. 236 (1976). Since the parties and the district court had not addressed the legal and factual issues made relevant by *Meachum* and *Montanye,*

we remanded to the district court. *Lokey v. Richardson,* 540 F.2d 1022 (9th Cir. 1976).

The district court dismissed the complaint with the following order:

> This matter having been submitted to the Court for consideration and decision on the record and pleadings on file, IT IS HEREBY ORDERED that plaintiffs' Complaint be dismissed both in light of MEACHUM v. FANO, 49 L.Ed.2d 451 and MONTANYE v. HAYMES, 49 L.Ed.2d 466 (1976), and because plaintiffs' present confinement in minimum security renders the issue moot.

Restoration of appellant's minimum custody status mooted his request for an injunction restraining prison officials from altering his custody classification without a hearing. But appellant also prayed for damages. At a minimum, appellant's allegations and the record developed thus far assert a claim for damages for mental and emotional distress arising from the failure to observe appellant's procedural rights that could be compensable. *See Carey v. Piphus,* 435 U.S. 247, 258-59 (1978). Moreover, regardless of actual damages, appellant could be entitled to nominal damages if he prevailed. *Id.* at 266. His action therefore was not mooted by his return to minimum custody.

Nor is appellant's claim necessarily extinguished by *Meachum* and *Montanye.* Those cases rejected the theory that the due process clause alone protected appellant from deprivation of his conjugal rights and minimum custody status without procedural safeguards, absent state law or practice which give rise to a right or a justifiable ex-

pectation that the prisoner's degree of confinement will change only for certain reasons or after certain procedures. *See Montanye v. Haymes, supra,* 427 U.S. at 242; *Meachum v. Fano, supra,* 427 U.S. at 226-28. The record neither establishes nor eliminates the possibility that such state-based expectations or rights with respect to appellant's confinement existed.

Appellant was not provided an opportunity to address, either by written submission or presentation of documents or testimony, the relevant California rules and practices governing prisoner classification. Until appellant has had an opportunity to explore and present his case with respect to state-created expectations, we cannot say his complaint failed to state a proper claim.

California argues that damages cannot be assessed because the appellee officials acted in good faith and therefore enjoyed qualified immunity from liability under section 1983. Appellant alleges affirmative bad faith, claiming that appellee officials acted with reckless or knowing disregard for his rights. The officials' good faith turns on what they may reasonably be charged with knowing regarding the state of the law at the time they acted, *see Procunier v. Navarette,* 434 U.S. 555, 562 (1978), a question that should not be reached without the benefit of consideration by the court below.

The appeal is submitted. The judgment dismissing the complaint is vacated and the case is remanded for further proceedings. In view of the nature of the proceedings and issues involved on remand, new counsel should be appointed to assist appellant in the presentation of his claim.

Reversed and remanded.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

No. 77-1689

Bob Lokey, et al.,
Plaintiffs-Appellants,
vs.
H. L. Richardson, etc., et al.,
Defendants-Appellees.

[Filed December 7, 1979]

ORDER

Before: BROWNING, ELY, and ANDERSON,
Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C

In the United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,
Plaintiffs-Appellants,
vs.
H. L. Richardson, et al.,
Defendants-Appellees.

[Filed April 16, 1975]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and ELY, Circuit Judges, and ANDERSON,* District Judge

PER CURIAM:

Appellant Lokey, a state prisoner confined in San Quentin serving a life sentence without possibility of parole, appeals the Order of the district court granting summary judgment in favor of defendants. The only issue before this Court is whether summary judgment was proper on appellant's claim that the decision of the California Department of Corrections to rescind his minimum custody classification was made without procedural due process.

*Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

In response to the decision of the California Supreme Court declaring the death penalty under California law unconstitutional in *People v. Anderson,* 6 C. 3rd 628, 493 P. 2d 880 (1972) and also in part prompted by the escape of an inmate who was serving a life sentence without possibility of parole, the Department of Corrections in November, 1972, advised all penal institutions within the state that no inmate serving a life sentence without possibility of parole could be classified minimum custody without prior review and concurrence of the departmental review board. In December of 1972 the review board considered appellant's case and decided to rescind his minimum custody status. Up to that time appellant had enjoyed minimum custody status for over two and one-half years and as one of the privileges of that status had the ability to be with his wife and two daughters at the overnight family visiting quarters on a monthly basis. Appellant was not afforded a hearing on the proposed reclassification. The revocation of minimum custody status automatically terminated appellant's participation in the family visitation program.

The panel is of the opinion that had the district judge had the benefit of this Court's decision in *Clutchette v. Procunier,* 497 F. 2d 809 (9th Cir. 1974), opinion on rehearing, ... F. 2d ..... (October 21, 1974) (hereinafter *Clutchette* II), and of the Supreme Court in *Wolff v. McDonald,* ..... U.S. ....., 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the contrary result would have been reached. In *Clutchette II* this Court held that some process is due to prisoners whose privileges are to be revoked as a disciplinary measure, where such revocation amounts to a

grievous loss. (Slip Opinion Pg. 2). The fact that Lokey's privileges were revoked as a result of a purely administrative, non-disciplinary decision, while in *Clutchette II* appellant's privileges were revoked as a disciplinary measure, is not a controlling distinction when considering whether due process attaches at all. The loss of appellant's ability to see and be with his family, a privilege previously granted to him by the state, was, and continues to be a grievous one, when considered in the context of prison life. See *Clutchette*, Slip Opinion, pg. 2. We therefore hold that appellant was entitled to a due process hearing prior to the non-disciplinary change in his custody classification.[1]

It would be inappropriate, in view of the lack of development of the record, to decide and spell out the procedural process due. Upon remand the district court should consider, after further factual development, what procedural requirements must be afforded to meet the exigencies of the situation in light of our holding in *Clutchette II*, and of the Supreme Court in *Wolff*.

It appearing that significant constitutional questions may be involved (no opinion is expressed), the District Court on remand may wish to consider the appointment of competent counsel to assist Lokey in the further prosecution of his claims.

REVERSED and REMANDED for further proceedings consistent with the opinion expressed herein.

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[1]Cf. *Fajerniak v. McGinnis*, 493 F. 2d 468 (9th Cir. 1974)

APPENDIX D

United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,
Plaintiffs-Appellants,
vs.
H. L. Richardson, etc., et al.,
Defendants-Appellees.

[Filed Dec. 9, 1975]

ORDER

Before: BROWNING and ELY, Circuit Judges, and
*ANDERSON, District Judge

The opinion filed April 16, 1975, is withdrawn. A new opinion is filed herewith. The time within which a petition for rehearing may be filed will run anew from this date.

*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

APPENDIX E

United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,
Plaintiffs-Appellants,
vs.
H. L. Richardson, etc., et al.,
Defendants-Appellees.

[Filed Dec. 9, 1975]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and ELY, Circuit Judges, and
*ANDERSON, District Judge

BROWNING, Circuit Judge:

Appellant Lokey, a state prisoner confined in San Quentin serving a life sentence without possibility of parole, appeals the order of the district court granting summary judgment in favor of appellees in appellant's suit under the Civil Rights Act, 42 U.S.C. § 1983. The only issue before this court is whether summary judgment was proper on appellant's claim that the decision of the California De-

*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

partment of Corrections to rescind his minimum custody classification was made without procedural due process.[1]

Appellant's uncontroverted allegations depict him as a model prisoner who had achieved a minimum security status accorded few convicts. He entered prison with a sixth-grade level education. While in custody he completed both high school and two years of college, receiving an associate in arts degree with honors. In addition, he completed a two-year course in office machine technology, graduating at the top of the class, and a two-year institutional course in "creative dynamics." During his imprisonment he read widely in the field of human physiology and anatomy, and in the behavioral sciences. He became an accomplished artist. He invented an improved Braille typewriter and a variety of tools, including a safety power saw, and organized a corporation to manufacture and market his innovations. An institutional report states, "Mr. Lokey is described by custody officials as maintaining excellant standards within the institutional setting, especially since 1964. Everyone that he comes in contact with speaks highly of him and he is a trusted individual working in a minimum setting who received work grades from above average to exceptional." Because of his exemplary conduct appellant was given a minimum custody classification enjoyed by only 20 or 30 inmates of San Quentin. He was permitted to travel to points distant from the prison ac-

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[1]Appellant also alleged that various California officials conspired to prevent commutation of appellant's sentence from life without possibility of parole to life with possibility of parole. Most of the proceedings below related to this issue. Appellant has restricted this appeal to the issue stated in the text. Other appellants are Mr. Lokey's wife and two minor children. The appellants appear *pro se.*

companied only by an unarmed security guard. He was second in command at the San Quentin firehouse, located outside the prison walls, serving surrounding communities as well as the institution. Most important, appellant's minimum security classification entitled him to participate in the Family Visiting Program, under which he was permitted to be with his wife and two children at overnight family visiting facilities outside the prison.

After two and a half years, appellant's minimum security status was abruptly terminated. He received no notice of the proposed change of status, and no hearing. He was given no reason for the reclassification, orally or in writing.[2] The revocation of his minimum security classification terminated the various privileges referred to, including appellant's participation in the family visitation program.

Appellees filed three documents in support of their motion for summary judgment. The first is an internal memorandum dated November 2, 1972, from the Chief Deputy Director of the State Department of Corrections, to Classification and Parole Representatives. It reads:

> Effective this date, and pending revision of Chapter VI of the Classification Manual, no inmate serving life without possibility of parole is to be classified minimum custody without prior review and concurrence by the Departmental Review Board. Any cases now so classified should be submitted to the Departmental Review Board for their review and action.

The second document submitted by appellees is an interoffice memorandum dated December 15, 1972, from the

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[2] *See* note 3 *infra.*

Chief of Classification Services to the Chief Deputy Director. It reads:

> REASON FOR REFERRAL
>
> Subject referred to [Departmental Review Board] by San Quentin staff as a result of the Director's policy regarding minimum custody classification for inmates serving Life Without Possibility of Parole.
>
> [DEPARTMENTAL REVIEW BOARD] ACTION
>
> [Departmental Review Board] met on December 15, 1972. Following a detailed review of all case factors Lokey *not* approved for assignment outside security fence area.

The third document submitted by appellees is a page from the State Classification Manual, containing a revision reading: "Inmates serving life without possibility of parole are not to be classified minimum custody without prior review and concurrence by the Departmental Review Board."

A fourth document is attached to appellant's opposition to the motion for summary judgment. It is a letter dated April 24, 1973, from the Director of Corrections, Appellee Procunier, to appellant. The portion of the letter relating to termination of appellant's minimum custody status reads as follows:

> If you recall, the abolishment of the death penalty required the movement of many people with serious offenses and received much public attention. Shortly after that, a person having a Life Without Possibility of Parole sentence escaped from one of our institutions. The combination of issues demanded a removal of such cases from minimum assignments.

> A Classification Manual change has been made to make this a general order which was made flexible to permit meritorious cases minimum assignments by order of the Departmental Review Board only. Your case was presented to the Departmental Review Board on December 15, 1972 for that consideration; however, the manner [in which] you have handled the disappointment clearly indicates at this point that the decision to bring you inside the security area was a proper one.[3]
>
> I can understand the feeling you have expressed and the disadvantages you have received. Unfortunately, the order regarding the minimum assignments was made to change a condition involving many people, and therefore must stand.

Appellees contend that these documents demonstrate that termination of appellant's minimal security status was a "purely administrative and nondisciplinary decision regarding the security of the institution," and resulted in the loss only of a "privilege." They argue that such a decision imposing such a loss does not require the procedural due process mandated by *Wolff v. McDonnell*, 418 U.S. 539 (1974), for disciplinary proceedings resulting in loss of good-time credit.

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[3]Appellee Procunier's reference to "the manner [in which appellant] handled the disappointment" does not appear to be a statement of the reason for the termination of appellant's minimal security status. As the record document referred to in the text reflects, appellant's minimum security status was terminated December 15, 1972. Appellee Procunier, writing on April 24, 1973, states that appellant's reaction indicates "at this point" that the earlier termination decision was proper. Perhaps the reference was to the filing of the present suit on March 31, 1973, less than a month before Appellee Procunier wrote.

Summary judgment on this ground was not proper. Appellees were not entitled to judgment "as a matter of law," Federal Rule of Civil Procedure 56(c), on the few uncontroverted facts reflected in this skimpy record.

The right to procedural due process turns upon whether there is an infringement of "liberty" (*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), not upon whether the deprivation is characterized as "administrative" rather than "disciplinary," or involves loss of a "privilege" rather than a "right." *Clutchette v. Procunier*, 510 F.2d 613, 615 (9th Cir. 1975).

Appellant alleges that termination of his minimal security status deprived him of highly significant privileges (including a familial relationship, especially protected by the law, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)), and worsened the conditions of his imprisonment in a most serious and substantial way. Such losses could be imposed as punishment only by due process of law. *Clutchette v. Procunier, supra.* They constitute no less a loss of "liberty" protected by the due process clause when imposed for "administrative" reasons. *See, e.g., Cardaropoli v. Norton,* ..... F.2d ....., ... (2d Cir. 1975); *Urbano v. McCorkle,* 334 F. Supp. 161, 168 (D. N.J. 1971), *aff'd mem.*, 481 F.2d 1400 (3d Cir. 1973); *Stone v. Egeler*, 377 F. Supp. 115, 118 (W.D. Mich. 1973), *aff'd as modified*, 506 F.2d 287 (6th Cir. 1974).

In *Cardaropoli*, the Second Circuit held that due process safeguards must be provided in the administrative classification of a newly admitted prisoner as a "Special Offender" or "Special Case." The Court of Appeals relied

upon a district court finding that such a classification "delays or precludes social furloughs, release to halfway houses and transfers to other correctional institutions; in some cases, the characterization may bar early parole." ..... F.2d at ....., *citing Catalano v. United States,* 383 F. Supp. 346, 350 (D. Conn. 1974). The Court of Appeals concluded, "[T]he marked changes in the inmate's status which accompany the designation create a 'grievous loss,' *Morrissey v. Brewer, supra,* 408 U.S. at 481; *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and may not be imposed in the absence of basic elements of rudimentary due process." ..... F.2d at .....[4]

Appellees argue, however, that the present case is controlled by prior decisions of this court holding that nonconsensual transfers of prisoners between institutions may be ordered without procedural protections. *Fajeriak v. McGinnis,* 493 F.2d 468 (9th Cir. 1974); *Hillen v. Director of Social Services & Housing,* 455 F.2d 510 (9th Cir.), *cert. denied,* 409 U.S. 989 (1972); *Duncan v. Madigan,* 278 F.2d 695 (9th Cir. 1960), *cert. denied,* 366 U.S. 919, 368 U.S. 905 (1961). The opinions in these cases do not indicate that the conditions of confinement of the transferees were substantially worsened by the transfers. As we recently noted, these cases hold only that nonconsensual

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[4]Appellant's entitlement to due process does not face an obstacle successfully overcome in *Cardaropoli* by the Second Circuit (... F.2d at ... n. 11): Cardaropoli sought procedural protection in the initial classification process; appellant seeks protection against the withdrawal of a status he has long enjoyed. *See* Friendly, "*Some Kind of Hearing,*" 123 U. Pa. L. Rev. 1267, 1295-96 (1975).

transfers do not constitute a violation of due process standing alone. We added, "[H]owever we have also held that transfers to penalize prisoners for their religious beliefs [are] unconstitutional, *Fajeriak v. McGinnis,* 493 F.2d 468 (9th Cir. 1974), and have been careful to note that we reserve opinion upon any general procedural rule involving the due process implications of nonconsensual transfers." *Stinson v. Nelson,* ..... F.2d ....., ... (9th Cir. 1975). *See also Tai v. Thompson,* 387 F. Supp. 912, 914 (D. Hawaii 1975).

In concluding that the termination of appellant's minimal security status may have deprived him of "liberty" protected by the Due Process Clause, we have relied upon appellant's uncontradicted allegations as to the seriously adverse consequences flowing from the reclassification. This will be a matter for proof on remand.

If the court on remand concludes that a "liberty" interest is at stake, the court must then determine what procedural protections are appropriate, based upon a careful balancing of the interests of the prisoner and the state in light of the facts as they may be developed. *Peacock v. Board of Regents,* 510 F.2d 1324, 1327 (9th Cir. 1975).[5] It would also be advisable for the trial court to develop

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[5]A loss may be of such slight consequence to the inmate that it is entirely outweighed by the interest of the prison administrator in summary disposition. In such a case, few procedural formalities, or none, may be required. *See Wolff v. McDonnell,* 418 U.S. 539, 571-72 n. 19 (1974); *Clutchette v. Procunier,* 510 F.2d 613, 615 (9th Cir. 1975); *cf. Cardaropoli v. Norton,* ... F.2d ..., ... n. 12 (2d Cir. 1975).

the facts relevant to whether the new procedural rules, if any, should be applied retroactively.[6]

For these purposes it is important to identify clearly the government action involved. Appellant does not challenge the administrative determination of the Department of Corrections announced in the Deputy Director's memorandum of November 2, 1972, that "[e]ffective this date, . . . no inmate serving life without possibility of parole is to

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[6]Appellees suggest that reversal is barred by the holding in *Wolff v. McDonnell*, 418 U.S. 539, 573-74 (1974), and *Wheeler v. Procunier*, 508 F.2d 888 (9th Cir. 1974), that the rule that due process safeguards are required in prison disciplinary proceedings is not to be applied retroactively. Appellees' suggestion necessarily assumes that this rule *does* apply to administrative classification proceedings, a position which appellees in fact vigorously reject.

The extension of the rule in *Wolff* from disciplinary to administrative classification proceedings presents substantial new issues as to whether a "liberty" interest is involved and, if so, what protections are appropriate to protect it. The latter issue, particularly, requires the balancing of quite different considerations, and may well result in quite different procedural requirements.

The present case is no more controlled by the nonretroactivity of the *Wolff* holding regarding due process requirements in disciplinary proceedings, that *Gagnon v. Scarpelli*, 411 U.S. 778 (1978) (involving due process requirements in proceedings to revoke probation) was controlled by the nonretroactivity of the holding in *Morrissey v. Brewer*, 408 U.S. 471 (1972) (involving due process requirements in proceedings to revoke parole). The procedural requirements announced in *Morrissey v. Brewer*, decided in 1972, were expressly applicable only "to future revocation of parole." Yet *Gagnon v. Scarpelli*, in extending the same procedural requirements to invalidate a revocation of probation that had occurred in 1965 (411 U.S. at 780), relied primarily upon *Morrissey v. Brewer*: "Petitioner does not contend there is any difference between the revocation of parole and the revocation of probation, nor do we perceive one." 411 U.S. at 782.

Of course, principles derived from cases involving nonretroactive holdings are applicable to new areas, even if the events in the later cases arose before the decision embodying the nonretroactive holding. *Wolff* itself relied upon *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, both nonretroactive.

be classified minimum custody without prior review and concurrence by the Departmental Review Board." Appellant contends only that he was entitled to due process in the decision to terminate his minimum security status pursuant to the statement in the second sentence of the Chief Deputy Director's memorandum that "[a]ny cases now so classified should be submitted to the Departmental Review Board for their review and action."

As Appellee Procunier pointed out in his letter of April 24, 1973, the adoption of the rule requiring prior Review Board concurrence in subsequent decisions to grant minimum security status to inmates serving a life sentence without possibility of parole was a policy decision affecting many people based upon facts that did not pertain particularly to appellant. The new rule did not provide that the existing minimum security classification of all such inmates was automatically revoked. On the contrary, it provided that such cases should be reviewed and acted upon individually. As noted, the new rule was effective November 2. The December 15 memorandum of the Chief of Classifications states that on that date the Board reviewed "all case factors" affecting appellant, and determined not to approve his assignment outside the security fence. The complaint alleges that appellant's minimum security status was terminated and he was confined within the prison on the same day. Appellant challenges only the procedures by which this determination of appellant's individual status was reached.

The significance of this fact is twofold. It is relevant to the procedural protections that may be appropriate; pro-

cedural devices affording an opportunity for effective participation in agency determinations are less rigorous when a rule of general application is being determined than when the issue at stake is the status under the rule of the particular individual who asserts the right to participate. K. Davis, Administrative Law Treatise §§ 7.01, 7.02, & 7.04 (1958 ed. and 1970 supp.); *see* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1268 (1975). It is also relevant to the retroactivity of the procedural rules that may be adopted; the impact of retroactivity of such rules upon the integrity of the fact finding involved and upon the interests both of prison administrators and inmates may be quite different in the context of adjudication than in the context of rule making.

Reversed and remanded.[7]

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[7]In view of the nature of the hearing that will be required on remand, the trial court may wish to consider the appointment of counsel to assist appellant in the presentation of his claim.

APPENDIX F

Supreme Court of the United States

June 28, 1976

Re: Richardson, et al. v. Lokey,
75-1116

The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Montanye v. Haymes,* ..... U.S. .... (1976) and *Meachum v. Fano,* ..... U.S. ..... (1976).

APPENDIX G

United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,
Plaintiffs-Appellants,

vs.

H. L. Richardson, etc., et al.,
Defendants-Appellees.

[Filed September 9, 1976]

ORDER

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, ELY, and ANDERSON,
Circuit Judges

Because the legal and factual considerations relevant to the decision of this case in light of *Montanye v. Haymes*, ... U.S. ..... (June 25, 1976), and *Meachum v. Fano*, ... U.S. ..... (June 25, 1976), were not addressed by the parties or the district court, the summary judgment is vacated and the cause remanded for further proceedings consistent with those decisions.

To Be Published

APPENDIX H

I. In 1972, California Penal Code section 5068 stated:

"The Director of Corrections shall cause each person committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of his life and the antecedents of the violation of law because of which he has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

"Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoners shall be confined.

"Before the release of any person committed under the provisions of Section 288 of this code, the director shall provide the Adult Authority with a psychiatric or psychological evaluation of such person.

"When diagnostic study of any other inmate so indicates, the director shall cause a psychiatric or psychological report to be prepared for the Adult Authority prior to release of such inmate.

"Before the release of any inmate, the director shall provide the Adult Authority with a written evaluation of his readiness for release." Cal. Stats. 1965, c. 1815, § 3.

California Penal Code section 5068 now states:

"The Director of Corrections shall cause each person committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of his life and the antecedents of

the violation of law because of which he has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

"Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoners shall be confined.

"When diagnostic study of any inmate committed under subdivision (b) of Section 1168 so indicates, the director shall cause a psychiatric or psychological report to be prepared for the Community Release Board prior to release of such inmate.

"Before the release of any inmate committed under subdivision (b) of Section 1168, the director shall provide the Community Release Board with a written evaluation of the prisoner." Cal. Stats. 1977, c. 165, § 82.

II. In 1972, California Penal Code section 5080 stated:

"The Director of Corrections may transfer persons confined in one state prison institution or facility of the Department of Corrections to another. The Adult Authority may request the Director of Corrections to transfer an inmate who is under its term-fixing or parole-granting jurisdiction if, after review of the case history in the course of routine procedures, such transfer is deemed advisable for the further diagnosis, and treatment of the inmate. The director shall as soon as practicable comply with such request, provided that, if facilities are not available he shall report that fact to the Adult Authority and shall make the transfer as soon as facilities become available; provided further, that if in the opinion of the Director of Correc-

tions such transfer would endanger security he may report that fact to the Adult Authority and refuse to make such transfer.

"When transferring an inmate from one state prison, institution, or facility of the Department of Corrections to another, the director may, as necessary or convenient, authorize transportation via a route that lies partly outside this State." Cal. Stats. 1963, c. 2019, § 2.

California Penal Code section 5080 now states:

"The Director of Corrections may transfer persons confined in one state prison institution or facility of the Department of Corrections to another. The Community Release Board may request the Director of Corrections to transfer an inmate who is under its parole-granting jurisdiction if, after review of the case history in the course of routine procedures, such transfer is deemed advisable for the further diagnosis, and treatment of the inmate. The director shall as soon as practicable comply with such request, provided that, if facilities are not available he shall report that fact to the Community Release Board and shall make the transfer as soon as facilities become available; provided further, that if in the opinion of the Director of Corrections such transfer would endanger security he may report that fact to the Community Release Board and refuse to make such transfer.

"When transferring an inmate from one state prison, institution, or facility of the Department of Corrections to another, the director may, as necessary or convenient, authorize transportation via a route that lies partly outside this state." Cal. Stats. 1976, c. 1139, § 300.